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No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER

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85 pp

QUESTION PRESENTED

Whether local governmental entities are subject to *qui tam* actions under the False Claims Act. 31 U.S.C. § 3729.

LIST OF PARTIES

The parties to the proceeding below were the petitioner/defendant, the County of Cook, the petitioner's co-defendant, the Hektoen Institute For Medical Research, and the respondent/plaintiff, Janet Chandler, a relator under the False Claims Act. The United States declined to intervene in this case but participated in the issues raised in this petition as an *amicus curiae* before the United States Court of Appeals for the Seventh Circuit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	7
ARGUMENT	10
I. A LOCAL GOVERNMENT IS NOT A "PERSON" SUBJECT TO SUIT UNDER THE ORIGINAL 1863 ENACTMENT OF THE FALSE CLAIMS ACT	11
A. The Plain Language Of The 1863 Act Establishes That Local Governments Are Not Subject To FCA Suits	11
B. The Legislative History Of The 1863 Act Confirms That Congress Did Not Intend For Local Governments To Be Subject To FCA Suits	17
II. THE 1986 AMENDMENTS TO THE FCA MADE LOCAL GOVERNMENTS IMMUNE FROM LIABILITY	21

TABLE OF CONTENTS—Continued

Page

A. Local Governments Are Absolutely Immune From FCA Suits Because Congress Did Not Abrogate The Common-Law Governmental Immunity From Punitive Damages 24

B. Congress' Determination Not To Impose Punitive Damages On Local Governments Is Consistent With Strong Public Policy Considerations 33

C. The United States Has Avenues Other Than The FCA To Recover For Fraud By Local Governments 37

CONCLUSION 38

TABLE OF AUTHORITIES

CASES Page

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) 14, 15

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) ..... *passim*

Cowles v. Mercer County, 74 U.S. (7 Wall.) 118 (1869) 14, 15, 16

Genty v. Resolution Trust Corp., 937 F.2d 899 (3d Cir. 1991) 25, 36

Georgia v. Evans, 315 U.S. 792 (1942) 20, 21

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 34

King v. St. Vincent Hosp., 502 U.S. 215 (1991) 11

Louisville, Cincinnati, and Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844) 15, 16

Massey v. City of Oklahoma, 643 F. Supp. 81 (W.D. Ok. 1986) 25

Mitchell v. Forsyth, 472 U.S. 511 (1985) 25

Monell v. Department of Soc. Serv. of City of New York, 436 U.S. 658 (1978) ..... *passim*

Ohio v. Helvering, 292 U.S. 360 (1934) 20

Owen v. City of Independence, Mo., 445 U.S. 622 (1980) 24

Pierson v. Ray, 386 U.S. 547 (1967) 24

Schultzen v. Woodbury Cent. Cmty. Sch. Dist., No. C01-4089-MWB, 2002 U.S. Dist. LEXIS 3010 (N.D. Iowa Feb. 22, 2002) 28

Sullivan v. Finkelstein, 496 U.S. 617 (1990) 21

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 23

United States v. Bornstein, 423 U.S. 303 (1976) 8, 18, 22

United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113 (1849) 11-12

TABLE OF AUTHORITIES—Continued

	Page
United States v. McNinch, 356 U.S. 595 (1958)	8, 18
United States ex rel. Chandler v. Cook County, Illinois, 282 F.3d 448 (7th Cir. 2002)	7
United States ex rel. Dunleavy v. County of Delaware, 279 F.3d 219 (3d Cir. 2002), *rhg. denied*, No. 00-3691 (Feb. 22, 2002), *petition for cert. filed*, No. 01-1711 (May 20, 2002)	*passim*
United States ex rel. Dunleavy v. County of Delaware, 2000 WL 1522854, 2000 U.S. Dist. LEXIS 14980 (E.D. Pa. Oct. 12, 2000), *aff'd*, 279 F.3d 219 (3d Cir. 2002)	7
United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d 486 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808, *rhg. denied*, 122 S. Ct. 1198 (2002)	*passim*
United States ex rel. Graber v. City of New York, 8 F. Supp. 2d 343 (S.D.N.Y. 1998)	*passim*
United States ex rel. Long v. SCS Business and Technical Inst., Inc., 173 F.3d 870 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202, 120 S. Ct. 2194 (2000)	13, 21, 22
United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943)	8
United States ex. rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607 (N.D. Cal. 1989)	18
United States ex rel. Weinberger v. Florida, 615 F.2d 1370 (5th Cir. 1980)	24
United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc., 508 U.S. 439 (1993)	11
Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000)	*passim*
Wright v. West, 505 U.S. 277 (1992)	21

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES AND REGULATIONS

	Page
1 U.S.C. § 1	12, 26, 27
1 U.S.C. § 2	27
15 U.S.C. § 3002	26
16 U.S.C. § 1532	26
16 U.S.C. § 4903	26
28 U.S.C. § 2461	4
31 U.S.C. § 3729	*passim*
31 U.S.C. § 3730	*passim*
31 U.S.C. § 3732	26
31 U.S.C. § 3733	10, 28, 29
31 U.S.C. § 3801	10, 32
31 U.S.C. § 3802	32
31 U.S.C. § 5312	27
33 U.S.C. § 1362	26
33 U.S.C. § 2701	26
42 U.S.C. § 300f	26
42 U.S.C. § 1983	13, 25, 34
42 U.S.C. § 2000e	26
42 U.S.C. § 2014e	26
42 U.S.C. § 6903	26
42 U.S.C. § 7602	26
42 U.S.C. § 9601	26
42 U.S.C. § 11049	26
43 U.S.C. § 1331	26
49 U.S.C. § 5102	27
49 U.S.C. § 60101	27
30 U.S.C.A. § 1511	27
49 U.S.C.A. § 40102	27
Act of Mar. 2, 1863, ch. 67, 12 Stat. 696	*passim*
Act of Feb. 24, 1864, ch. 13, 13 Stat. 6	19
Act of July 4, 1864, ch. 237, 13 Stat. 379	19
Act of Feb. 25, 1871, ch. 71, 16 Stat. 431	12, 14, 16
Act of Dec. 23, 1943, ch. 377, 57 Stat. 608	4

TABLE OF AUTHORITIES—Continued

	Page
42 C.F.R. § 52.8	37
45 C.F.R. § 74.13	37
45 C.F.R. § 74.48	37
45 C.F.R. § 74.62	37
45 C.F.R. § 92.43	37
45 C.F.R. § 92.52	37
85 C.F.R. § 85.3	4
LEGISLATIVE HISTORY	
131 Cong. Rec. 22,322 (1985)	31
132 Cong. Rec. 22,335, 22,336, 22,339, 22,340 (1986)	26, 29, 31, 32
132 Cong. Rec. 28,580, 28,581 (1986)	31, 32
H.R. Rep. No. 94-.343 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2596	29
S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266	*passim*
S. 467, 37th Cong., 3d Sess. (Jan. 15, 1863)	17
S. 467, 37th Cong., 3d Sess. (Jan. 29, 1863)	17
Cong. Globe, 37th Cong., 3d Sess. 952 (1863)	17, 18, 19, 34
MISCELLANEOUS	
Proclamation No. 24, 13 Stat. 750 (Dec. 19, 1864)	18
1 F. Shannon, *The Organization and Administration of the Union Army, 1861-1865* (1965)	18
Tomes, *Fortunes of War*, 29 Harper's Monthly Mag., 228 (1864)	18

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-26a, is reported at 277 F.3d 969 (7th Cir. 2002). The opinions of the district court, Pet. App. 27a-29a; Pet. App. 30a-49a, are reported at 118 F. Supp. 2d 902 (N.D. Ill. 2000) and 35 F. Supp. 2d 1078 (N.D. Ill. 1999).

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2002. The petition for a writ of certiorari was filed on April 19, 2002. The Court granted the petition on June 28, 2002. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

As presently codified, the pertinent liability provision of the False Claims Act, 31 U.S.C. § 3729, provides as follows:

§ 3729. False claims

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

31 U.S.C. § 3729(a) (2000). The full text of the current version of the False Claims Act, 31 U.S.C. §§ 3729-3733, and the full text of its original version, "An Act to prevent and punish Frauds upon the Government of the United States," Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, are set forth in an appendix to this brief. *See* Appendix A, 1a-31a; Appendix B, 32a-37a.

STATEMENT OF THE CASE

1. The False Claims Act ("FCA") imposes liability on "[a]ny person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a) (2000). The person found in violation of the FCA is subject to "a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." *Id.* An FCA action can be brought by the Attorney General or by a private individual, a *qui tam* relator, on behalf of the United States. *Id.* § 3730. If brought by a relator, the complaint is filed under seal, and the United States has an opportunity to intervene and proceed with the action. *Id.* § 3730(b)(2). If the United States opts to intervene in the case and either settles the case or prevails at trial, the relator receives between 15% and 25% of the proceeds. *Id.* § 3730(d)(1). However, if the United States declines to intervene, the relator "who initiated the action shall have the

right to conduct the action." *Id.* § 3730(b)(4)(B). If successful, the relator receives between 25% and 30% of the proceeds together with reasonable expenses, attorneys' fees and costs. *Id.* § 3730(d)(2).

The FCA does not define a "person" subject to liability; however, the term "person" has remained in the statute "unchanged" since the original enactment in 1863. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000). The original enactment of the FCA, known as "An Act to prevent and punish Frauds upon the Government of the United States," authorized private individuals to bring an action on behalf of the United States; a successful relator was entitled to collect one half of the double damages and fines. Act of Mar. 2, 1863, ch. 67, §§ 4, 6, 12 Stat. 696, 698. For years, the FCA remained virtually the same.[1] However, in 1986, Congress enacted the most significant changes of the FCA's 123-year history. Included in the 1986 amendments to the FCA was the increase in the civil remedy from mandatory double to mandatory treble damages and an increase in fines from $2,000 to between $5,000 and $10,000 for each violation. 31 U.S.C. § 3729(a).[2]

2. In 1989, the National Institute of Drug Abuse ("NIDA") called for proposals for a treatment program for and a

[1] In 1943, Congress amended the FCA by, *inter alia*, decreasing the relator's bounty to a "fair and reasonable compensation" if the United States intervened or to a maximum of 25% if the United States did not intervene. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608. In 1982, Congress replaced "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States" with "[a] person not a member of an armed force of the United States." 31 U.S.C. § 3729 (1982); *see also Stevens*, 529 U.S. at 782.

[2] Pursuant to the Federal Civil Penalties Inflation Act of 1990, 28 U.S.C. § 2461, the FCA's penalties were increased in 1999 to range between $5,500 and $11,000 per false claim. *See* 85 C.F.R. § 85.3(a)(9).

research study of substance-abusing pregnant women. Pet. App. 31a. Cook County Hospital ("CCH"),[3] a Cook County-owned and operated hospital, submitted a grant proposal to conduct a treatment program and research study over a five-year period. Pet. App. 31a, 32a. NIDA awarded a $5 million grant to CCH. Pet. App. 32a. After CCH developed the treatment and study protocol, NIDA transferred the administration of the grant from CCH to the Hektoen Institute for Medical Research ("Hektoen"). *Id.* Hektoen hired Relator Janet Chandler, Ph.D. ("Relator"), a psychologist, as the project director on September 1, 1993 and fired her on January 24, 1995. Pet. App. 32a, 33a.

3. On January 24, 1997, Relator filed this FCA action against Cook County, Illinois ("Cook County"), CCH,[4] and Hektoen, alleging that they failed to comply with the terms and conditions of the grant by reporting "ghost" research subjects, failing to obtain informed consent forms from patients, failing to randomize patients, and submitting false progress reports. Pet. App. 32a. Relator also alleges that defendants, in contravention of the protocol, administered improper doses of methadone to patients, improperly engaged in early detoxification of patients, and otherwise provided substandard medical care to patients. *Id.* Relator contends that her discharge was retaliatory. Pet. App. 30a.

Relator does not claim that the grant money was used for any purpose other than to treat patients and conduct a research study. Nor does she claim that any person or entity used grant money for personal gain. Relator seeks treble the amount of the grant, that is to say, $15 million, plus fines of

[3] The Cook County Board of Commissioners changed the name of Cook County Hospital to the "John H. Stroger, Jr. Hospital of Cook County" effective December 18, 2001.

[4] CCH was dismissed from this lawsuit as having no identity independent of Cook County. Pet. App. 47a.

up to $10,000 each for an unspecified number of alleged false claims, together with costs, expenses, and attorneys' fees.

4. The United States declined to intervene in this case.[5] In February 1998, Relator amended her complaint and served it on the defendants. All defendants moved to dismiss. During the briefing of the motions to dismiss, the United States District Court for the Southern District of New York issued a decision holding that the FCA "does not authorize suits against municipal entities." *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 356 (S.D.N.Y. 1998). In light of that decision, Cook County was granted leave to supplement its motion to dismiss.

On February 8, 1999, the district court denied Cook County's motion to dismiss, holding that municipal entities are "persons" under the FCA. Pet. App. 46a. The district court also found that the mandatory treble damages scheme of the FCA is not punitive, and, thus, that Cook County is not immune from suit. Pet. App. 30a. Cook County appealed the district court's denial of its immunity claim under the collateral order doctrine. In an unpublished order, on May 18, 1999, the court of appeals dismissed the appeal on the ground that "[t]here is no arguable immunity issue and no basis for appellate jurisdiction over Cook County's appeal." Pet. App. 50a. Cook County petitioned for a writ of certiorari, which the Court denied on October 12, 1999. Pet. App. 51a.

On May 22, 2000, the Court held that States are not subject to suit under the FCA. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000). Among other things, the Court found that "the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of

[5] Because the United States declined to intervene, only *qui tam* liability is at issue in this case.

punitive damages on governmental entities." *Id.* at 784-85 (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-63 (1981)).

Following the Court's decision in *Stevens*, Cook County moved the district court to reconsider the denial of its earlier motion to dismiss. On reconsideration, the district court found no reason to depart from its earlier conclusion that Cook County is a "person" under the FCA. However, the district court held that Cook County was immune from liability because of the FCA's punitive damages, and, therefore, should be dismissed. In reaching that conclusion, the district court relied on the Court's decision in *Stevens* and on the Eastern District of Pennsylvania's subsequent decision in *United States ex rel. Dunleavy v. County of Delaware*, 2000 WL 1522854, 2000 U.S. Dist. LEXIS 14980 (E.D. Pa. Oct. 12, 2000), *aff'd*, 279 F.3d 219 (3d Cir. 2002). Pet. App. 28a, 29a.

5. On January 22, 2002, the court of appeals reversed the district court's dismissal of Cook County, holding that local governments were presumed to be "persons" subject to liability when the FCA was originally enacted in 1863. Pet. App. 8a. The court of appeals also held that local governments are not immune from the FCA's punitive damages regime because Congress did not specifically exempt them. Pet. App. 17a-18a. The court of appeals stayed the issuance of mandate pending the Court's disposition of this case. *United States ex rel. Chandler v. Cook County, Illinois*, 282 F.3d 448 (7th Cir. 2002).

SUMMARY OF THE ARGUMENT

1. The False Claims Act ("FCA") subjects to liability "any person" who submits a false claim to the United States. However, the FCA does not define "person." In *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, the Court observed that the term "person" was included in the

original enactment of 1863 ("1863 Act") and has remained in the statute "unchanged" since that time. 529 U.S. 765, 783 n.12 (2000). The plain language of the 1863 Act shows that Congress did not subject local governments to liability. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. Notably, the 1863 Act expressly refers to the military status of the "person" and subjects the "person" to criminal penalties, *id.*, both of which are incompatible with local governmental liability.

The court of appeals' decision in this case turned on its erroneous conclusion that local governments were presumed "persons" as far back as 1844. Pet. App. 8a. That conclusion was based on a misreading of *Monell v. Department of Soc. Serv. of City of New York*, 436 U.S. 658 (1978). What *Monell* stated is that *private* corporations were held to be persons in 1844 but that it was not until 1869 that "the [same] principle was automatically and without discussion extended to municipal corporations." *Id.* at 687-88. In other words, local governments were not presumed to be "persons" for purposes of suit in federal court until six years after the FCA was originally enacted in 1863. The court of appeals erroneously read into the 1863 Act a presumption that did not exist at that time.

The legislative history and overall purpose of the 1863 Act further confirms that local governments were not Congress' target. Significantly, the 1863 Act was enacted as a result of widespread fraud against the federal government in the sale of provisions and munitions during the Civil War. *United States v. McNinch*, 356 U.S. 595, 599 (1958). As the Court has repeatedly noted, Congress originally enacted the FCA "with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Stevens*, 529 U.S. at 781 (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976)); *see also McNinch*, 356 U.S. at 599; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943).

Instead of studying the text and legislative history of the 1863 Act, the court of appeals sought to ascertain the meaning of the word "person" in the 1863 Act by looking to a Senate Judiciary Committee Report issued 123 years later. Pet. App. 10a-11a. That report, as the Court has previously determined, is based on a mistaken interpretation of the original enactment and case law. *See Stevens*, 529 U.S. at 783 n.12. Congress did not subject local governments to liability under the 1863 Act. Inasmuch as the term "person" has remained in the statute "unchanged" since 1863, *see Stevens*, 529 U.S. at 783 n.12, local governments have never been subjected to FCA liability. The court of appeals erred in holding otherwise. Moreover, the court of appeals' summary conclusion that local governments were presumptively included in the term "person" in the 1863 Act infected its analysis of the 1986 amendments to the FCA.

2. In 1986, Congress imposed mandatory treble damages and increased the fines for violations of the FCA. The Court in *Stevens* characterized the FCA's treble damages scheme as "essentially punitive." *Stevens*, 529 U.S. at 784. There is a presumption that local governments enjoy a common-law immunity from punitive damages that is rebutted only if Congress expressly abrogates the immunity. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-63 (1981). Nowhere in the text of the 1986 amendments is there an explicit expression that Congress abrogated the governmental immunity from punitive damages. Nor does the legislative history of the 1986 amendments contain an expression of Congressional intent to impose punitive damages on local governments. Therefore, even if local governments were "persons" subject to suit under the 1863 Act, in 1986, when Congress increased the damages to a punitive level, local governments became absolutely immune from FCA suits because Congress did not expressly abrogate the common-law governmental immunity from punitive damages.

Unlike the FCA's liability provision, both the civil investigative demands provision of the FCA and the Program Fraud Civil Remedies Act, a sister statute of the FCA, expressly define "person." 31 U.S.C. § 3733; 31 U.S.C. § 3801. These provisions further demonstrate a Congressional intent to exclude local governments from the FCA's punitive liability.

The court of appeals employed an incorrect standard to reach its conclusion that Congress intended local governments to be subject to punitive damages under the FCA. Instead of looking for express evidence that Congress abrogated the common-law immunity, as required by *City of Newport*, the court of appeals erroneously held that, in the absence of an express *exemption*, local governments were subject to the FCA's punitive damages.

Strong policy reasons support Congress' determination not to subject local governments to FCA liability. The burden of the FCA's punitive damages would be borne by the taxpayers of local governments, resulting in either reduced services or increased taxes. Moreover, *qui tam* actions undermine the cooperative relationship between the United States and local governments in which the United States provides funding to local governments which, in turn, administer a panoply of programs and services for the benefit of their residents. At the same time, the United States has sufficient remedies other than the FCA to recover for fraudulent claims submitted by local governments. Pet. App. 17a.

The Court should reverse the judgment of the court of appeals.

ARGUMENT

Congress did not subject local governments to FCA suits when it passed the 1863 Act. Nor did Congress choose to do so when it enacted the 1986 amendments. Congress' original intent was both clear and perfectly understood. Tellingly, in

the period from 1863 to 1986, there is not a single reported case in which a local government was sued under the FCA. It was not until the 1986 amendments, when the damages were trebled and the fines substantially increased, that local governments suddenly became targets for enterprising relators. However, a "person" subject to liability under the FCA has never included local governments. Moreover, even if local governments were "persons" under the 1863 Act, in 1986, when Congress increased the damages to a punitive level without expressly abrogating the common-law governmental immunity from punitive damages, Congress effectively excluded local governments from the FCA's reach.

I. A LOCAL GOVERNMENT IS NOT A "PERSON" SUBJECT TO SUIT UNDER THE ORIGINAL 1863 ENACTMENT OF THE FALSE CLAIMS ACT.

A. The Plain Language Of The 1863 Act Establishes That Local Governments Are Not Subject To FCA Suits.

The term "person" is not defined in 31 U.S.C. § 3729 (2000). The Court recently observed, however, that the term "person" has remained in the statute "unchanged" since the FCA was originally enacted in 1863. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000). Therefore, any analysis of the term "person" must begin with the 1863 Act.

The meaning of statutory language, "plain or not," depends on context. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Since before the Civil War, the Court has "stressed that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (quoting *United*

States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1849)).[6] An examination of the context in which the term "person" was used in the 1863 Act firmly supports the conclusion that local governments could not be reached under the statute.

1. At least two features of the plain language of the 1863 Act indicate that Congress did not direct it at local governments. First, the 1863 Act was aimed at "any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war," and "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States." Act of Mar. 2, 1863, ch. 67, §§ 1, 3, 12 Stat. 696, 696, 698. Congress' use of military status to qualify the term "person" constitutes strong indicia that the term "person" in the 1863 Act did not include local governments.

Second, the 1863 Act made fraud upon the government a criminal offense: persons in the military were subject to court-martial (but expressly exempt from punishment of death), while persons not in the military were subject to punishment by "imprisonment not less than one, nor more than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars." *Id.* §§ 1, 3, 12 Stat. at 697, 698. The criminal penalties for a person not in the military were in addition to the $2,000 forfeiture per false claim and double damages. *Id.* § 3, 12 Stat. at 698. The 1863 Act also provided that "[a]ny such person [violating the act] may be arrested and held to bail in such sum as the district judge may order, not exceeding the said sum of two thousand dollars, and twice the amount of the damages sworn

[6] Likewise, under the Dictionary Act, which was enacted eight years after the 1863 Act, the definition of the term "person" is qualified by the context of its use. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431 (current version at 1 U.S.C. § 1 (2000)).

to in the affidavit of the person bringing the suit." *Id.* § 5, 12 Stat. at 698. Finally, the 1863 Act made any person in the military who has committed a violation, but who is subsequently discharged or dismissed from service, still subject to court-martial "in the same manner and to the same extent as if he had not received such discharge or been dismissed." *Id.* § 2, 12 Stat. at 696-97.

As the Court observed in *Stevens*, since the 1863 Act applied only to "any person not in the military" and "imposed criminal penalties that included imprisonment," it was far from clear that States were subject to the 1863 Act. 529 U.S. at 782; *see also United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 878 (D.C. Cir. 1999) (criminal penalty inconsistent with State liability under FCA). The criminal penalties and military reference are likewise inherently inconsistent with local governmental liability. Nothing in the text of the 1863 Act remotely suggests that "person" included local governments. The court of appeals' conclusion that the term person included local governments cannot be squared with the text of the 1863 Act.

2. Instead of reading the term "person" within the context of the 1863 Act, the court of appeals, citing *Monell v. Department of Soc. Serv. of City of New York*, 436 U.S. 658 (1978), read into the plain language a "presumption" that municipal corporations were included within the meaning of "person" in 1863. Pet. App. 8a. Both *Monell* and the cases cited therein disprove the court of appeals' interpretation and confirm that local governments were *not* "presumptively" persons subject to suit in federal court in 1863.

Monell considered whether municipal corporations were persons when the Civil Rights Act, 42 U.S.C. § 1983 ("Section 1983"), was enacted in 1871. *Monell*, 436 U.S. at 665-89. The Court noted that Congress was concerned about takings of private property by local governments. *Id.* at 687 ("Given this purpose, it beggars reason to suppose that

Congress would have exempted municipalities from suit."). The Court also noted that an Act of Congress ("Dictionary Act"), enacted only months before Section 1983 was enacted, provided that: "'In all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense.'" *Id.* at 688 (quoting Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431). *Monell* concluded that municipal corporations were included within the term "person" when Section 1983 was enacted in 1871. *Id.* at 688-89.

Contrary to the court of appeals' interpretation, *Monell* did not find that "by 1844, both private and municipal corporations were presumptively included within the meaning of 'person.'" Pet. App. 8a. Rather, the Court observed in *Monell*:

> [O]nly two years before the debates on the Civil Rights Act, in *Cowles v. Mercer County*, 7 Wall. 118, 121 (1869), the *Letson* principle was automatically and without discussion extended to municipal corporations. Under this doctrine, municipal corporations were routinely sued in the federal courts and this fact was well known to Members of Congress.

Id. at 688 (citation omitted). Thus, *Monell* points out that municipal corporations were routinely sued in federal court *after* the *Cowles* decision in 1869.

A closer look at the Court's nineteenth century cases cited in *Monell* shows that, while, in 1844, it was established that *private* corporations doing business were generally considered persons for the purpose of lawsuits in federal court, that same understanding had *not* been expanded to *public* or municipal corporations by 1863. *Id.* In 1809, in *Bank of the United States v. Deveaux*, the Court considered whether a private corporation had a legal identity apart from its "corporators" for purposes of jurisdiction. 9 U.S. (5 Cranch)

61 (1809). The Court held that the act of incorporation conferred no right on the plaintiff bank to sue in federal courts. *Id.* at 86. "[T]he corporate name represents persons who are members of the corporation." *Id.* at 91. The Court concluded that its jurisdiction depended on "the character of the individuals who compose the corporation." *Id.* at 91-92.

The Court revisited this decision in 1844, when it abandoned the reasoning in *Deveaux*. *Louisville, Cincinnati, and Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844). In *Letson*, the Court noted:

> A suit then brought by a citizen of one state against a corporation by its corporate name in the state of its locality, by which it was created and where its business is done by any of the corporators who are chosen to manage its affairs, is a suit, so far as jurisdiction is concerned, between citizens of the state where the suit is brought and a citizen of another state. The corporators as individuals are not defendants in the suit, but they are parties having an interest in the result, and some of them being citizens of the state where the suit is brought, jurisdiction attaches over the corporation—nor can we see how it can be defeated by some of the members, who cannot be sued, residing in a different state.

Id. at 554. The Court concluded that "a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial one, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person." *Id.* at 558. Thus, the *Letson* holding applied only to private business corporations, not public or municipal ones.

As the Court noted in *Monell*, it was not until 1869 that the Court extended *Letson* to public corporations. *Monell*, 436 U.S. at 688 (citing *Cowles v. Mercer County*, 74 U.S.

(7 Wall.) 118 (1869)). The opinion in *Cowles v. Mercer County* begins:

> The record presents but one question which has not been heretofore fully considered and repeatedly adjudicated. That question is, whether the board of supervisors of Mercer County can be sued in the Circuit Court of the United States by citizens of other States than Illinois.

74 U.S. (7 Wall.) 118, 121 (1869). *Cowles* noted that, prior to 1844, "it was held necessary to aver the requisite citizenship of [a corporation's] corporators" and that *Letson* changed the existing law with respect to private business corporations. *Id. Cowles* expanded on *Letson*: "In the case before us the corporators are all citizens of Illinois, and the corporation is liable to suit within the narrowest construction of the Constitution." *Id.* at 121-22. The Court held, in 1869, that the board of supervisors, being "a corporation created by acts of the legislature of Illinois" and "authorized to contract for the county," could be sued in federal court. *Id.* at 122. However, inasmuch as the 1863 Act was enacted six years before the *Cowles* decision, the holding in *Cowles* does not support the court of appeals' position that local governments were presumptively considered persons in 1863.[7]

The court of appeals erred in applying to the plain language of the 1863 Act a presumption that did not exist in 1863. The absence of that presumption together with the exclusion of local governments from the plain language of the 1863 Act conclusively establish that the term "person" in the FCA does not include local governments.

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[7] The Dictionary Act does not compel otherwise. The 1863 Act was enacted eight years before the Dictionary Act defined "person" to include "bodies politic and corporate" unless the context in which it is used indicates otherwise. Act of Feb. 25, 1871, § 2, 16 Stat. 431. However, the Dictionary Act, by its own terms, applied only to subsequent acts of Congress. *Id.* ("in all acts hereafter passed"). Thus, the Dictionary Act has no application to the 1863 Act.

B. The Legislative History Of The 1863 Act Confirms That Congress Did Not Intend For Local Governments To Be Subject To FCA Suits.

1. The legislative history clearly establishes that local governments are not subject to liability. As it worked its way through Congress, the bill which became the FCA was narrowed substantially. As originally introduced, Senate Bill 467 broadly would have made liable "any person" submitting a false claim. S. 467, 37th Cong., 3d Sess. § 1 (Jan. 15, 1863). The bill subsequently was referred to the Committee on Military Affairs and the Militia and extensively rewritten. Among other things, the revised bill replaced the phrase "any person" with the phrases "any person in the land or naval forces" and "any person not in the military." S. 467, 37th Cong., 3d Sess. §§ 1, 4 (Jan. 29, 1863). In so doing, Congress clearly expressed its intention not to reach all types of "fraudsters." *See Stevens*, 529 U.S. at 781 n.10 (FCA was intended to cover all types of fraud, but not all types of "fraudsters").

Further evidence that Congress did not intend to subject local governments to liability under the 1863 Act can be seen in its consideration and ultimate rejection of a provision allowing for court-martial and punishment without presentment or indictment by a grand jury of any person *not in the military* "who shall contract to furnish" military supplies to the United States fraudulently. S. 467, 37th Cong., 3d Sess. § 2 (Jan. 29, 1863). Following a vigorous debate,[8] these controversial provisions were withdrawn from

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[8] Senator Howard, the author of Senate Bill 467 and chair of the Senate Committee on Military Affairs, argued that a person who contracts with the United States to supply arms is no different from the officer and soldier who bears the arms and, therefore, should be treated as a member of the military subject to court-martial. Cong. Globe, 37th Cong., 3d Sess.

Senate Bill 467, Cong. Globe. 37th Cong., 3d Sess. at 957-58 (1863), and were not enacted.

Placed in its historical context, the 1863 Act was adopted as a response to the "plundering of the public treasury" in the "purchasing of necessities of war." *McNinch*, 356 U.S. at 599. Quoting a book on the Civil War, one court remarked:

> The War Department found itself at the hands of unscrupulous and corrupt government contractors. The abuses and damage done to the federal treasury and war effort was, for defense contractors, an opportunity for windfall profit. The contractors were fast becoming "proverbially and notoriously rich."

United States ex. rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989) (citing 1 F. Shannon, *The Organization and Administration of the Union Army, 1861-1865*, at 54-55 (1965)). As indicated in a contemporary periodical, "[f]or sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories." *Id.* (quoting Tomes, *Fortunes of War*, 29 Harper's Monthly Mag., 228 (1864)). Thus, the principal goal of the 1863 Act was "'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Stevens*, 529 U.S. at 781 (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976), but adding "[private]").[9] No court, to date, has identified any case of a

953 (1863). Senators Cowan and Davis thought the idea a "monstrous proposition" and "stupendous absurdity." *Id.* at 956-57.

[9] It would have been quite anomalous for Congress, at the height of the Civil War, to subject cities and other local governments in the Union to liability under the 1863 Act. Indeed, as populous centers, the cities in the North were expected to respond in the largest numbers to the President's call for volunteer soldiers. *See* Proclamation No. 24, 13 Stat. 750

local government having sold military goods to the United States during the Civil War, let alone defrauding the United States in the sale of military goods. *See United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 494 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808 (2002) (observing that neither relator nor the United States supplied any authority to show that the FCA's framers contemplated liability for local governments).

Unlike the legislative history of Section 1983, which indicates that Congress intended to include local governments as defendants, the FCA's legislative history contains no such indications. *Id.* This is not surprising because the number of federally-funded services provided by local governments are largely the result of legislation passed in the latter half of the twentieth century. Therefore, it is unlikely that Congress, in 1863, ever envisioned local governments as recipients of federal funding or federal contracts. There is simply no evidence in the legislative history to suggest that Congress contemplated applying the 1863 Act to local governments. The 1863 Act's plain language, viewed together with its legislative history, supports the conclusion that the term "person" did not include local governments. *See Stevens*, 529 U.S. at 781-82 (noting that the 1863 Act applies to private contractors and corporations).

(Dec. 19, 1864) (calling for 300,000 volunteers); *see also* Act of Feb. 24, 1864, ch. 13, § 2, 13 Stat. 6 (requiring local governments to meet quota based on the "number of men resident" therein); Act of July 4, 1864, ch. 237, §§ 1, 8, 13 Stat. 379, 380 (crediting volunteers to the quota of local governments). On the other hand, the fraudulent activities of private defense contractors, left unchecked, would have set the North's war efforts back at a critical time. *See* Cong. Globe, 37th Cong., 3d Sess, 953 (1863) (statement of Senator Howard: "[I]t is entirely clear that without the employment of contractors for the purpose of procuring [supplies], the Army itself would be totally worthless and useless.").

2. In concluding that local governments were "persons" subject to suit under the 1863 Act, the court of appeals in this case found persuasive a 1986 Senate Committee Report, S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273, which states that the term "person" in the FCA includes "States and political subdivisions thereof." Pet. App. 10a. The assertion contained in the Senate Committee Report purports to be based on case law, but as the Court has noted, the Senate Committee's understanding of the meaning of "person" in the FCA was "erroneous." *Stevens*, 529 U.S. at 783 n.12. The court of appeals in this case side-stepped the Court's finding by limiting the Court's remark to "States." Pet. App. 11a at n.8. *Stevens*, however, made no such distinction. Indeed, the 1986 Senate Committee Report is based on a mistaken interpretation of the 1863 Act and case law and is, therefore, likewise erroneous with respect to local governments.

The Senate Committee Report's Background Statement, "History of the False Claims Act and Court Interpretations," to which the court of appeals cites, claims to describe "person" under the FCA:

> The False Claims Act reaches all parties who may submit false claims. The term "person" is used in its broad sense to include . . . States and political subdivisions thereof. *Cf. Ohio v. Helvering*, 292 U.S. 360, 370 (1934); *Georgia v. Evans*, 315 U.S. 792 (1942); *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

S. Rep. No. 99-345, at 8-9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273-74. The cases to which the Senate Committee Report cites, none of which involve the FCA, highlight the Senate Committee's fundamental misunderstanding of the history of the FCA.[10] *See United States ex rel. Dunleavy v.*

[10] In *Ohio v. Helvering*, the Court held that a State did not enjoy immunity from the federal liquor tax where it "engages in a business of a private nature" as opposed to when it engages in a governmental function. 292 U.S. at 368. In *Georgia v. Evans*, the Court held that States are "persons" with standing to bring suits under the Sherman Act. 315 U.S. at 162-63. In *Monell*, the Court found that municipalities were considered "persons" amenable to suit in 1871 for purposes of Section 1983 claims. 436 U.S. at 688-89. None of the cases cited in the Senate Committee Report stand for the proposition that "person" in the FCA includes local governments.

County of Delaware, 279 F.3d 219, 226 (3d Cir. 2002), *rhg. denied*, No. 00-3691 (Feb. 22, 2002) *petition for cert. filed*, No. 01-1711 (May 20, 2002); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 353 (S.D.N.Y. 1998).

Moreover, the Senate Committee Report is no more than "a legislative observation about what § 3729(a), enacted by an earlier Congress, means." *Long*, 173 F.3d at 878. As the Court has continually observed, "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *West v. Wright*, 505 U.S. 277, 295 n.9 (1992) (citations omitted); *see also Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring) ("*post*-enactment history of a statute's consideration and enactment—is a contradiction of terms") (emphasis in original). The court of appeals erred in relying on inaccurate post-enactment history.

Because the undefined term "person" has remained in the statute unchanged since 1863 and because "person" subject to suit did not, in 1863, include local governments, local governments are not subject to liability under the FCA.

II. THE 1986 AMENDMENTS TO THE FCA MADE LOCAL GOVERNMENTS IMMUNE FROM LIABILITY.

Even if local governments were "persons" subject to suit under the 1863 Act, in 1986, when Congress imposed mandatory treble damages—which *Stevens* found to be punitive—local governments became absolutely immune from an FCA

suit. While Congress has the power to impose punitive damages on local governments, it must do so expressly. In enacting the 1986 amendments, Congress did not expressly abrogate the governmental common-law immunity from punitive damages, effectively immunizing local governments from FCA suits.[11]

Prior to *Stevens*, the law was unsettled as to whether the FCA's damages under the 1986 amendments were punitive. *Stevens* resolved this question: "the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Stevens*, 529 U.S. at 784-85 (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-63 (1981)). The Court contrasted the FCA's current damages regime with the pre-1986 regime, noting that the earlier version, which imposed double damages and a $2,000 penalty per false claim, was remedial rather than punitive. *Id.* at 785 (citing *United States v. Bornstein*, 423 U.S. 303, 315 (1976)). In *Stevens*, the Court observed: "'The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the

[11] "[T]here is a significant conceptual overlap—though admittedly not an identity—between the abrogation inquiry and the statutory construction question" whether Congress intended to include local governments as defendants upon which mandatory treble damages could be assessed. *See Long*, 173 F.3d at 889; *see also Dunleavy*, 279 F.3d at 223 ("whether the term 'person' as used in the [FCA] encompasses local governments . . . is simply the other side of the coin with respect to the question . . . whether Congress clearly abrogated local governmental immunity under the FCA"). Congress' imposition of punitive damages in 1986 also stands as a confirmation that the term "person" does not include local governments. *Cf. Stevens*, 529 U.S. at 784-87 (punitive damages feature of FCA further supporting Court's conclusion that "person" does not include States).

liability of wrongdoers.'" *Id.* at 786 (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981)).

The three circuits that have considered whether the FCA's mandatory treble damages regime can be imposed on local governments have all followed *Stevens* for the proposition that the FCA's damages under the 1986 amendments are punitive. *See Dunleavy*, 279 F.3d at 223; *Garibaldi*, 244 F.3d at 491; Pet. App. 13a. However, two circuits held that the FCA's punitive damages constitute a bar to suits against local governments, *Dunleavy*, 279 F.3d at 226 ("local governments are exempt from FCA damages"); *Garibaldi*, 244 F.3d at 495 ("The punitive damages regime of the False Claims Act shows a congressional intent that the False Claims Act should not be applied to local governments."), whereas the court of appeals in this case found that the interpretative presumption against the imposition of punitive damages on local governments had been overcome. Pet. App. 18a.

The court of appeals, having initially determined that a presumption existed in 1863 that local governments were "persons," concluded that the 1986 amendments indicate "continued liability" of local governments under the FCA because Congress did not expressly exclude local governments from the FCA's punitive damages. Pet. App. 9a. In arriving at that conclusion, the court of appeals ignored the well-established requirement that, if Congress intends to impose punitive damages on local governments, it must expressly indicate its intent. The court of appeals employed an incorrect standard by looking for an express exemption of local governments as opposed to an express abrogation of local governmental immunity from punitive damages. Neither the 1986 amendments nor the legislative history surrounding the enactment of those amendments support the

court of appeals' conclusion that Congress intended local governments to be subject to the FCA's punitive damages.[12]

A. Local Governments Are Absolutely Immune From FCA Suits Because Congress Did Not Abrogate The Common-Law Governmental Immunity From Punitive Damages.

1. There is a well-settled presumption that local governments are not subject to punitive damages. *Stevens*, 529 U.S. at 785. In *City of Newport v. Fact Concerts, Inc.*, the Court noted that certain common-law immunities were well-established as affirmative defenses and confirmed that the immunity against punitive damages on governmental entities "was not open to serious question." 453 U.S. 247, 258-59 (1981).

The Court has, "on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen v. City of Independence, Mo.*, 445 U.S. 622, 637 (1980) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)); *see also City of Newport*, 453 U.S. at 263; *Graber*, 8 F. Supp. 2d at 351 ("If *City of Newport* means anything at all, it means that it is up to Congress to clearly signal its desire to subject municipalities to exemplary damages, regardless of the plaintiff."). "The general rule today is that no punitive

[12] There is no indication that a local government had ever been sued under the FCA prior to the 1986 amendments. The only reported FCA case prior to 1986 that was brought against *any* governmental entity was *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370 (5th Cir. 1980), a suit against a State. The court of appeals never reached the question of whether Florida was a proper defendant under the FCA because the judgment was vacated for lack of subject matter jurisdiction, the action being premised on information already in the hands of the United States. *Id.* at 1371.

damages are allowed [against a governmental entity] unless expressly authorized by statute." *City of Newport*, 453 U.S. at 261 n.21.

Significantly, the local governmental immunity from punitive damages is an *absolute* immunity. *See City of Newport*, 453 U.S. at 271. "[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Where a complaint seeks both compensatory and punitive damages under its legal theory, such as a Section 1983 claim, a local government can claim immunity from liability from the punitive damages portion of the relief sought. Where, on the other hand, a suit is brought under a statute that *mandates* treble damages and a district court has no discretion to reduce the damage award, as in the FCA, the governmental immunity from punitive damages necessarily becomes an immunity from suit. *See, e.g., Dunleavy*, 244 F.3d at 225; *Graber*, 8 F. Supp. 2d at 356 (dismissing city from FCA case); *compare Genty v. Resolution Trust Corp.*, 937 F.2d 899, 914 (3d Cir. 1991) (RICO suit cannot be maintained against a municipal corporation because its mandatory treble damages are punitive); *Massey v. City of Oklahoma*, 643 F. Supp. 81, 86 (W.D. Ok. 1986) (same).[13]

City of Newport was decided five years before Congress amended the FCA in 1986. Thus, Congress, in 1986, was aware of the local governmental immunity against the imposition of punitive damages when it increased the FCA's

[13] The FCA contains an exception to the imposition of mandatory treble damages, providing that double damages can be assessed in those cases in which defendants provide information regarding a violation to the United States before they have knowledge that an investigation into the violation is under way. 31 U.S.C. § 3729(a). However, unless a local government acts under this exception, the mandatory punitive damages scheme necessarily applies. *See Stevens*, 529 U.S. at 785 n.16.

damages. Moreover, Congress understood the damages to be punitive. Indeed, Congress, in amending the FCA, was pursuing the dual goals of punishment and deterrence. *See* 132 Cong. Rec. 22,336-37 (1986) (statement of Rep. Fish). Congress also made the punitive damages scheme mandatory. 31 U.S.C. § 3729(a). Finally, Congress understood that it could not abrogate the common-law immunity unless it affirmatively manifested its intention to do so.

The text of the 1986 amendments contains no expression of any intent by Congress that the FCA's punitive damages be imposed on local governments. While Congress contemporaneously defined certain key terms in the liability provision, such as "claim" and "knowing," 31 U.S.C. § 3729(b)-(c), it did not define "person" to include local governments, the clearest means of expressly abrogating the governmental immunity. If anything, in 1986, Congress was concerned with fraud on local governments and protection of local taxpayers when it conferred federal jurisdiction over State law claims arising from the same occurrence as an action brought under Section 3730 "for recovery of funds paid by a State or local government." 31 U.S.C. § 3732 (2000).

Congress knows how to signal clearly its intention to subject a local government to liability. Congress has defined "person" to include units of local government in other statutes covering a broad range of substantive law. *See Dunleavy*, 279 F.3d at 224; *Graber*, 8 F. Supp. 2d at 351 n.8 (collecting statutes); *see also* 15 U.S.C. § 3002(1) (2000); 16 U.S.C. § 1532(13) (2000); 42 U.S.C. § 2000e(a) (2000); 42 U.S.C. § 2014e(s) (2000); 42 U.S.C. § 7602(e) (2000); 42 U.S.C. § 9601(21) (2000); 42 U.S.C. § 6903(15) (2000); 16 U.S.C. § 4903(4) (2000); 33 U.S.C. § 1362(5) (2000); 42 U.S.C. § 300f(12) (2000); 33 U.S.C. § 2701(27) (2000); 42 U.S.C § 11049(7) (2000); 43 U.S.C. § 1331(d) (2000). In fact, as if emphasizing that the Dictionary Act, 1 U.S.C. § 1, does not include local governments in its definition of "person" in

other statutes, Congress has specified when governmental entities are to be considered persons *in addition to* the entities included in the definitions in the Dictionary Act. *See, e.g.*, 30 U.S.C.A. § 1511(d) (2002) ("As used in this subchapter, the term 'person' includes municipalities, . . . as well as the entities included within such term under section 1 of Title 1."); 49 U.S.C.A. § 40102(a)(33) (2002) (person includes, "in addition to its meaning under section 1 of title 1," a municipality); *see also* 49 U.S.C. § 60101(a)(17) (2000); 31 U.S.C. § 5312(a)(4) (2000); 49 U.S.C. § 5102(9)(A) (2000).[14]

The FCA "offers no clear indication that Congress intended to abrogate local governmental immunity from punitive damages." *Dunleavy*, 279 F.3d at 224. For that reason, the *Garibaldi* court refused to find that Congress intended to subject municipal entities to liability under the FCA. *Garibaldi*, 244 F.3d at 492 ("Though Congress is free to make that determination if it chooses, we will not find such a choice absent clear language in the text of the FCA."). For that same reason, the *Dunleavy* court found: "At best, after considering the text of the statute and its legislative history, we find only ambiguity as to whether Congress intended to disturb the well-settled doctrine of local governmental immunity from punitive damages under the FCA. Ambiguity, however, is not enough . . . to carry the day." *Dunleavy*, 279 F.3d at 225.

In contrast, the court of appeals, turning *City of Newport* on its head, looked for an express *exemption* of municipal entities from the FCA's punitive damages and, finding none,

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[14] In the current version of the Dictionary Act, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (2000). The Dictionary Act separately defines a "county" to include "a parish, or any other equivalent subdivision of a State or Territory of the United States." *Id.* § 2.

flatly held that the presumption had been overcome. Pet. App. 16a ("Congress made no adjustment to the general scheme for municipal entities."). In so doing, the court of appeals ignored the Court's consistent refusal "to construe the general language of [a statute] as automatically abolishing such traditional immunities by implication." *See City of Newport*, 453 U.S. at 258. The court of appeals erred in invoking an unprecedented standard—one that is contrary to the Court's requirement of an explicit expression from Congress. *See id.* at 261 n.21.[15]

The absence of an explicit abrogation of immunity in the liability provision of the FCA is a clear indication that Congress did not intend to impose punitive damages on local governments. As *Dunleavy* put it: "Congress' imposition of treble damages is powerful evidence that Congress did not intend to subject local governments to punitive damages under the FCA." *Dunleavy*, 279 F.3d at 225.

2. Other provisions of the FCA enacted in 1986 confirm that Congress did not intend for local governments to be subject to liability for punitive damages. The Civil Investigative Demands ("CID") provision, which authorizes the Attorney General to issue civil investigative demands to persons with information relevant to a false claims investigation, defines "person:" "*for purposes of this section*, . . . the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision." 31 U.S.C. § 3733(l) (2000) (emphasis added). The CID provision creates "a pre-lawsuit

[15] One federal district court recently "performed an exhaustive search and yet was unable to find any court of appeals decisions, with the exception of the Seventh Circuit's recent decision in *Chandler*, authorizing an award of punitive damages against a municipality, absent express statutory authority to do so." *Schultzen v. Woodbury Cent. Cmty. Sch. Dist.*, No. C01-4089-MWB, 2002 U.S. Dist. LEXIS 3010, at *86 (N.D. Iowa Feb. 22, 2002).

discovery mechanism which allows the Department of Justice to conduct discovery in civil false claims cases, without the expense of first filing a civil fraud case in Federal district court." 132 Cong. Rec. 22,336 (1986) (statement of Rep. Glickman). The FCA's CID provision was modeled on the Hart-Scott-Rodino Antitrust Improvements Act of 1976, S. Rep. No. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5266, 5298, which provided the Antitrust Division with expanded opportunities for pre-complaint discovery against "non-target" third parties. H.R. Rep. No. 94-1343, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2596, 2597. Similarly, the FCA's CID provision allows "persons," including non-target local governments, as well as States, to be served with pre-complaint discovery, even though States and local governments are not subject to liability under the FCA. As the Court observed in *Stevens*, States may have important evidence with respect to the United States' investigation of false claims by private parties. *See Stevens*, 529 U.S. at 784 n.13. The same is true of local governments.

Yet, according to the court of appeals: "Although [the CID] definition does not demonstrate Congressional intent to impose liability on municipalities, it certainly does not support an inference that Congress intended them to be exempt." Pet. App. 10a. The court of appeals' analysis is not consonant with *Stevens*, which concluded that "[t]he presence of such a definitional provision in § 3733 [CID provision], together with the absence of such a provision from the definitional provisions contained in § 3729 [liability provision], *see* §§ 3729(b)-(c), suggests that States are not 'persons' for purposes of *qui tam* liability under § 3729." *Stevens*, 529 U.S. at 784. This same analysis suggesting that States are not "persons" under the FCA holds true for local governments. The CID's definition of "person" to include political subdivisions of States, coupled with the undefined term "person" in the liability provisions, supports a

conclusion that Congress did not expressly abrogate the governmental immunity from punitive damages in the FCA.

Another change to the FCA in 1986 considered by the court of appeals was the whistleblower provision. 31 U.S.C. § 3730(h). The whistleblower provision was enacted in response to testimony that Congress heard from employees of the defense industry, not of local governments. *See* S. Rep. No. 99-345, at 2, 14, *reprinted in* 1986 U.S.C.C.A.N. at 5270, 5279. The whistleblower provision uses the word "employers" without defining the term, *id.*, though the 1986 Senate Committee Report states that the term "employer" includes "public as well as private sector entities." Pet. App. 11a (citing S. Rep. 99-345 at 34-35, *reprinted in* 1986 U.S.C.C.A.N. at 5299-5300). Based on that phrase in the Senate Committee Report, the court of appeals concluded there would be no reason to subject local governments to whistleblower liability if they were not already subject to FCA liability. Pet. App. 11a. However, the whistleblower provision protects an employee by preventing a chilling effect on disclosure of illegal practices even if the employer is not proven to have violated the FCA. S. Rep. 99-345, at 35, *reprinted in* 1986 U.S.C.C.A.N. at 5300. Therefore, it does not follow that Congress, by subjecting a governmental entity to liability for retaliation, necessarily intended to make that entity liable under Section 3729, knowing that the United States could pursue a remedy by way of a separate cause of action such as breach of contract or fraud, or by way of the administrative process.

More important, the practical effect of the court of appeals' interpretation of the whistleblower provision would be abrogation of immunity not only by implication, but by an implication drawn from an unrelated provision. The imposition of punitive damages on local governments through the whistleblower provision is not the explicit abrogation of a common-law immunity required by *City of Newport*.

Contrary to the court of appeals' conclusion, neither the CID nor the whistleblower provisions of the FCA communicate a congressional intent to impose punitive damages on local governments.

3. The legislative history of the 1986 amendments further supports a clear reading of the current FCA as excluding local governments from liability. As in 1863, the focus in 1986 was on the defense industry and the fraudulent conduct of private contractors. Senator Grassley, the sponsor of the False Claims Reform Act, S. 1562, which was later enacted, as amended, as the False Claims Act Amendments Act of 1986, S. Rep. No. 99-345 at 13, *reprinted in* 1986 U.S.C.C.A.N. at 5278, explained that the FCA is "even more crucial today as the Government spends hundreds of billions of dollars on contracts with *private corporations* in areas such as defense, aerospace, and construction." 131 Cong. Rec. 22,322 (1985) (emphasis added).[16] There was no discussion regarding fraud by local governments. *See Graber*, 8 F. Supp. 2d at 354 ("[T]here is no indication that fraud by . . . municipalities, as opposed to fraud by individuals and corporations, played any role in Congress's consideration of the 1986 amendments.").

Instead, Congress saw the taxpayers as the ultimate beneficiaries of the amendments. Senator Grassley explained that the bill "arose from a realization that the government needs help—lots of help—to adequately protect taxpayer

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[16] Representative Brooks stated that the amendments "are urgently needed in light of the recent indications of massive procurement abuses occurring in the recent military buildup." 132 Cong. Rec. 22,336 (1986). Representative Berman commented about "anonymous calls from potential whistleblowers in defense plants who were aware of illegal practices." 132 Cong. Rec. 22,339 (1986). Senator Grassley's discussion of "corporations" as the target of the amendments, 132 Cong. Rec. 28,581 (1986), indicates that the 99th Congress was focusing on private corporations.

funds from growing and increasingly sophisticated fraud." 132 Cong. Rec. 28,580 (1986). Representative Glickman noted that the bill "deals with the issue of civil and criminal penalties for those who try to take advantage of taxpayers in this country by filing false claims against the Government." 132 Cong. Rec. 22,335 (1986). While Congress' goal was to protect taxpayer funds from fraud, it expressed no intention to permit recovery from some of the same taxpayers, *i.e.*, those unfortunate individuals who pay taxes to a local government found liable under the FCA. It makes no sense to have local taxpayers compensate themselves as federal taxpayers for fraudulent acts of the local governments they fund. In sum, there is no indication in the legislative history of the 1986 amendments that Congress contemplated, much less intended, to impose the FCA's punitive damages on local governments.

4. Additional evidence that local governments are not subject to the FCA's punitive damages is found in a sister statute enacted at the same time as the 1986 amendments and "designed to operate in tandem with the FCA." *See Stevens*, 529 U.S. at 786 n.17. The Program Fraud Civil Remedies Act ("PFCRA") provides an administrative remedy for the United States to pursue false claims of $150,000 or less. 31 U.S.C. § 3801. The PFCRA prohibits the same conduct as the FCA and provides for penalties of $5,000 per false claim and double damages. *Id.* § 3802. Unlike the FCA, the PFCRA defines "person" subject to liability as "any individual, partnership, corporation, association, or private organization." *Id.* § 3801(a)(6). The same section later employs the phrase "political subdivision of a state" in defining the term "statement," *id.* § 3801(a)(9), signifying that the 99th Congress was well aware of the language it needed to employ in order to bring local governments within the purview of a statute.

In *Stevens*, the Court observed that it would be "most peculiar to subject States to treble damages and civil penalties in *qui tam* actions under the FCA, but exempt them from the relatively smaller damages provided under the PFCRA." *Stevens*, 529 U.S. at 786. The same is true for local governments. It would, indeed, be peculiar for the same Congress to have allowed suits for punitive damages against local governments under the FCA but not allow suits under the PFCRA, which provides for only double damages based on smaller initial amounts. Because Congress did not explicitly abrogate the common-law governmental immunity from punitive damages, which are mandatory under the FCA, local governments are immune from FCA suits altogether.

B. Congress' Determination Not To Impose Punitive Damages On Local Governments Is Consistent With Strong Public Policy Considerations.

As the Court has recognized, strong public policy considerations against penalizing local governments with punitive damages require an explicit expression of Congressional intent to abrogate the local governmental immunity. *See City of Newport*, 453 U.S. at 261-63. The relationship between the United States and units of local government is necessarily one of co-dependence and cooperation. The federal government provides funding for services that a local government, in turn, provides directly to its residents. In fact, it is that cooperative relationship of passing funds to a local government for the administration of direct services that makes local governments "deep pocket" targets for FCA relators. FCA suits against local governments interfere with procedures for funding and grant administration designed to ensure both compliance with federal requirements and the provision of government services.

Qui tam relators, "motivated primarily by prospects of monetary reward rather than the public good . . . are thus less

likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).[17] Consequently, the interests of the United States and a relator vis-à-vis local governments may not be compatible. In fact, *qui tam* relators can undermine the cooperative relationship enjoyed by the federal and local governments by the threat of disruption of services or by punitive damage awards. FCA suits leave local governments with equally unpalatable choices of rejecting federal funds or, if sued, either being coerced into settlement by the threat of punitive damages or incurring the cost of litigation and risking a substantial adverse judgment, which, of course, would be shouldered by the local taxpayers.

The error in the court of appeals' judgment is further demonstrated by the policy justifications offered for its view that Congress imposed punitive damages on local governments. First, the court of appeals distinguished *City of Newport* on the grounds that "there are important differences between [the punitive damages] available under sec. 1983 and those imposed by the FCA." Pet. App. 15a. The court of appeals reasoned that the imposition of punitive damages on local governments under the FCA would not be "unjust" because, unlike Section 1983 of the Civil Rights Act, where "both the compensatory and punitive damages come directly from the tax base," a portion of the recovery under the FCA comes from monies taken by the municipality through its false claims. *Id.* The Court in *Stevens* did not recognize such a distinction between Section 1983 and the FCA but noted instead that both statutes were "designed to benefit

[17] Senator Howard, the sponsor of the 1863 Act, explained that the *qui tam* provision was based "upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue.'" Cong. Globe, 37th Cong., 3d Sess. 952, 956 (1863).

the citizens of the United States." *Stevens*, 529 U.S. at 785 n.15. Whatever differences may exist between the damages scheme in the FCA and in Section 1983, they do not support a departure from the Court's well-established principle that, unless Congress expressly abrogates the presumption, local governments are immune from punitive damages.

The court of appeals also erred in assuming that the local taxpayers derive a benefit from fraudulent conduct of a local government in that "[p]resumably any ill-gotten gains from the federal government produce more services or lower taxes." Pet. App. 15a. First, Relator's own complaint suggests that federal monies were used in a manner that did not produce the intended benefit to the tax-paying public or, for that matter, any benefit at all. Pet. App. 32a. Moreover, paying *three times* the amount of any "ill-gotten gain" plus hefty fines is punitive and will necessarily come from the local tax base, taking its toll in the way of reduced services or increased taxes, not vice versa. Punitive damages, by definition, are meant to punish. *See City of Newport*, 453 U.S. at 261. "Though a local government can properly be made to pay compensation for the wrongful acts of its agents, punishing a local government is pointless." *Garibaldi*, 244 F.3d at 491.

The court of appeals' reasoning deviates from this Court's expressed concern with the hardship caused by imposing punitive damages on local taxpayers. *See Stevens*, 529 U.S. at 785 n.15. ("A better reading of *Newport* is that we were concerned with imposing punitive damages on tax-payers *under any circumstances*.") (emphasis added). Neither the local taxpayers nor the recipients of the federally-funded services play any role in the conduct giving rise to a local government's liability, yet these are the very persons who would suffer the punishment. As *Dunleavy* noted:

> [T]he rationale for exempting a municipal entity from punitive damages awards is firmly grounded in public

> policy because "assessing punitive damages against a public entity serves neither the retributive nor the deterrent purposes of . . . civil punishment and contravenes public policy by punishing the taxpayers and citizens who constitute the very persons who 'are to benefit from the public example which the granting of such damages is supposed to make of the wrongdoer.'"

Dunleavy, 279 F.3d at 222 (quoting *Genty*, 937 F.2d at 910) (citation omitted). *Garibaldi*, which had before it a school district defendant, explained:

> Imposing punitive damages on a local government in favor of the federal government is especially problematic. Requiring such a transfer payment would reflect a judgment by Congress that denying the school children of Orleans Parish needed services, or requiring the taxpayers of Orleans Parish to pay higher taxes, is justified in light of the relatively minor benefit to the federal treasury. Though Congress is free to make that determination if it chooses, we will not find such a choice absent clear language in the text of the False Claims Act.

Garibaldi, 244 F.3d at 492. Nowhere in the text of the FCA or in its legislative history has Congress indicated such an intent.

Moreover, here, if successful, Relator's bounty at the expense of Cook County taxpayers would be virtually the same as the amount of the federal grant. Relator, on behalf of the United States, seeks to recover $15 million, treble the amount of the $5 million grant, plus $10,000 each for an unspecified number of false claims. Because the United States has not intervened, if successful, Relator's share of the recovery could reach $4.5 million (30% of $15 million), not including the additional 30% of the fines. All in all,

Relator could receive, at the cost of Cook County's taxpayers, an amount that essentially equals the alleged harm to the United States.[18]

There are many kinds of local governmental entities, each created to serve the public in one fashion or another. Local governments provide, among other things, schools, roads, transportation systems, infrastructure, public health systems, law enforcement, correctional systems and agricultural services. FCA suits, by their very nature, would draw money from such services and the intended beneficiaries of such services. While Congress certainly has the power to impose punitive damages on local governments, Congress did not give an explicit indication of such an intent in the FCA. Therefore, local governments are absolutely immune from FCA suits.

C. The United States Has Avenues Other Than The FCA To Recover For Fraud By Local Governments.

An absolute governmental immunity against the FCA's mandatory imposition of punitive damages does not create an all or nothing proposition for the United States. Importantly, if the United States believes that it has been defrauded by a local government, it has remedies other than the FCA, such as administrative proceedings, proceedings to suspend or debar a local government that is eligible to enter into contracts with the federal government, or actions in fraud, unjust enrichment and breach of contract. *See, e.g.*, 42 C.F.R. § 52.8; 45 C.F.R. §§ 74.13, 74.48, 74.62; 45 C.F.R. §§ 92.43, 92.52. In fact, the FCA expressly permits the United States to pursue alternative remedies for fraud claims. 31 U.S.C.

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[18] This is a prime example of why an FCA suit can be so financially devastating for local governments, at times pushing them into high settlements, the burden of which falls on the local taxpayers.

§ 3730(d)(5). While alternative remedies would not provide the United States with a windfall and would not provide a *qui tam* relator with a bounty, the United States can still be made whole.

Congress was well aware of the options available to the United States when it increased the FCA's damages to a punitive level but did not abrogate the common-law governmental immunity. Congress' silence together with the serious policy considerations that militate against the imposition of the FCA's punitive damages on local governments confirm that local governments are absolutely immune from FCA suits.

CONCLUSION

The court of appeals' decision should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

FULL TEXT OF THE FALSE CLAIMS ACT, 31 U.S.C. §§ 3927-3933 (2000)

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or

decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) KNOWING AND KNOWINGLY DEFINED.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) CLAIM DEFINED.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3729 (2000).

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall

not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money

penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO THE QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus

reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant

prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3730 (2000).

§ 3731. False claims procedure

(a) A subpena [sic] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3731 (2000).

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A sum-

mons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

§ 3733. Civil investigative demands

(a) IN GENERAL.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy

Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) CONTENTS AND DEADLINES.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the

person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by

appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS. Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative

demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall

be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it

and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) CONDUCT OF ORAL TESTIMONY.—(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the

oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation

pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was

obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any

such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) DEFINITIONS.—For purposes of this section—

(1) the term "false claims law" means—

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law inves-

tigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

31 U.S.C. § 3733 (2000).

APPENDIX B

FULL TEXT OF ACT OF MARCH 2, 1863,
12 STAT. 696 (1863)

Chap. LXVII.—An Act to prevent and punish Frauds upon the Government of the United States.

Be it enacted by the Senate and house of Representatives of the United States of America in Congress assembled, That any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry; any person in said forces or service who shall make or procure to be made, or knowingly advise the making of any false oath to any fact, statement, or certificate, voucher or entry, for the purpose of obtaining, or of aiding to obtain, any approval or payment of any claim against the United States or any department or officer thereof; any person in said forces or service who, for the purpose of obtaining or enabling any other person to obtain from the Government of the United States, or any department or officer thereof, any payment or allowance, or the approval or signature of any person in the military, naval, or civil service of the United States, of or to any false, fraudulent, or fictitious claim, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any signature

upon any bill, receipt, voucher, account, claim, roll, statement, affidavit, or deposition; and any person in said forces or service who shall utter or use the same as true or genuine, knowing the same to have been forged or counterfeited; any person in said forces or service who shall enter into any agreement, combination, or conspiracy to cheat or defraud the Government of the United States, or any department or officer thereof, by obtaining, or aiding and assisting to obtain, the payment or allowance of any false or fraudulent claim; any person in said forces or service who shall steal, embezzle, or knowingly and willfully misappropriate or apply to his own use or benefit, or who shall wrongfully and knowingly sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or to be used for the military or naval service of the United States; any contractor, agent, paymaster, quartermaster, or other person whatsoever in said forces or service having charge, possession, custody, or control of any money or other public property, used or to be used in the military or naval service of the United States, who shall, with intent to defraud the United States, or willfully to conceal such money or other property, deliver or cause to be delivered to any other person having authority to receive the same any amount of such money or other public property less than that for which he shall receive a certificate or receipt; any person in said forces or service who is or shall be authorized to make or deliver any certificate, voucher, or receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other public property so used or to be used, who shall make or deliver the same to any person without having full knowledge of the truth of the facts stated therein, and with intent to cheat, defraud, or injure the United States; any person in said forces or service who shall knowingly purchase or receive, in pledge for any obligation or indebtedness, from any soldier, officer, or other person called into or employed in said forces or

service, any arms, equipments, ammunition, clothes, or military stores, or other public property, such soldier, officer, or other person not having the lawful right to pledge or sell the same, shall be deemed guilty of a criminal offense, and shall be subject to the rules and regulations made for the government of the military and naval forces of the United States, and of the militia when called into and employed in the actual service of the United States in time of war, and to the provisions of this act. And every person so offending may be arrested and held for trial by a court-martial, and if found guilty shall be punished by fine and imprisonment, or such other punishment as the court-martial may adjudge, save the punishment of death.

Sec. 2. *And be it further enacted*, That any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed.

Sec. 3. *And be it further enacted*, That any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act, he shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit, and every such person shall in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more

than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars.

Sec. 4. *And be it further enacted*, That the several district courts of the United States, the circuit court of the District of Columbia, or any court therein to be established having general jurisdiction in civil cases, the several district courts of the Territories of the United States within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Sec. 5. *And be it further enacted*, That it shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of this act by persons liable to such suit, and found within their respective districts or territories, and to cause him or her to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the said sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

Sec. 6. *And be it further enacted*, That the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount of such forfeiture, as well as one half of the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid

over to the United States; and such person shall be entitled to receive to his own use all costs the court may away against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

Sec. 7. *And be it further enacted*, That every such suit shall be commenced within six years from the doing or committing the act, and not afterwards.

Sec. 8 *And be it further enacted*, That no officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm; and every such *such* officer agent, or member, or person, so interested, who shall so act, shall, upon conviction thereof, be punished by a fine of not more than two thousand dollars nor less than five hundred dollars, and by imprisonment for a term not exceeding two years.

Sec. 9 *And be it further enacted*, That all acts and parts of acts inconsistent with or repugnant to any of the provisions of this act are hereby repealed, saving, however, and excepting any and all suits or prosecutions now commenced pending, and all rights of suit or prosecution under any prior act of Congress, on account of the doing or committing of any act hereby prohibited; and all rights and claims which the United States, or any person or persons, now have, growing out of such prior act; all which pending suits and prosecutions shall proceed and be determined, and all which rights and claims shall remain and be as valid and effectual as if this present act had not been passed; nor shall this act be so construed as in

any way to impair or affect the obligation, duty, or liability of any person who now is or shall hereafter become the surety of any person contracting with the United States, or any officer or agent thereof; but every such surety shall be liable and answerable for the default of his principal in the same manner as if this act had not been passed, save to the extent to which his principal has performed the contract, or, if damages have been so recovered, to the extent of one half of the damages so recovered and paid; which last amount may be shown in reduction of damages in any suit brought against the principal and surety, or principals and sureties, on their contract.

APPROVED, March 2, 1863.